

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREW BAKER,	:	
Plaintiff	:	
	:	
vs.	:	CIVIL NO. 1:CV-06-0932
	:	
BOROUGH OF PORT ROYAL,	:	
PENNSYLVANIA,	:	
Defendant	:	

M E M O R A N D U M

I. Introduction

We are considering the converted motion for summary judgment of the Defendant, Borough of Port Royal ("Port Royal"). Plaintiff, Andrew Baker ("Baker"), a former Port Royal police officer, filed this lawsuit pursuant to 42 U.S.C. § 1983 claiming that Port Royal violated his due process rights by abolishing its police force in bad faith to avoid providing a hearing before removing him from office. Upon review of the briefs as well as the record, we will grant summary judgment to Port Royal.

II. Background

A. Procedural History

Baker filed a three-count complaint (doc. 1) pursuant to 42 U.S.C. § 1983. Baker's claim is based on his alleged

Fourteenth Amendment property interest in employment as a police officer. Baker amended his complaint to remove the third count which sought a writ of mandamus requiring Port Royal to reestablish its police force, reinstate him, and pay damages.

Port Royal moved to dismiss Baker's complaint for failing to state a claim upon which relief could be granted. (doc. 7). After concluding that we could not decide the motion to dismiss without referring to the content of its attached exhibits, we converted the motion to one for summary judgment pursuant to Federal Rule of Civil Procedure 12(b). (doc. 17). In doing so, we provided notice to the parties, granted a period for discovery, and allowed each party to submit a supplemental brief and other evidentiary materials. *Id.*

After conducting discovery, each party filed a supplemental brief, statement of material facts, and appendix of exhibits. (docs. 23-27). Shortly thereafter, we ordered the parties to submit a second round of supplemental briefs addressing the affidavit of Officer Kent A. Smith, submitted in support of Baker's opposition to Port Royal's motion for summary judgment. (doc. 28). Both parties submitted a second round of briefs and supporting exhibits, (docs. 31, 32, 33) and the motion is now ripe for our review.

B. Factual Background

1. Police Services in Port Royal

Baker was employed by Port Royal as a regular, full-time police officer. Port Royal Statement of Material Facts ("PR SMF"), ¶ 1. In 2003, the Port Royal Police Department provided police services within the Borough, as well as Fermanagh Township and Mifflintown Borough through a contract with each municipality. *Id.* ¶ 2. The Port Royal Police Department had two full-time officers, Baker and Richard Curran, as well one part-time officer, Mary Woods. *Id.* ¶ 3. At some point in 2003, Richard Curran resigned and Mary Woods was named as a full-time officer. *Id.* ¶ 4.¹

2. Port Royal Abolishes its Police Force

The path toward abolition of the Port Royal Police Department began in 2004. In early 2004, Port Royal's monthly distribution of police coverage included: 140 hours of police coverage to Port Royal, 100 hours of coverage to Mifflintown Borough, and 80 hours of coverage to Fermanagh Township, a total of 320 hours per month. Baker SMF ¶ 7. Effective January 12, 2004, Fermanagh Township terminated its contract with Port Royal for police services, citing financial concerns. PR SMF ¶ 5. Fermanagh's decision cost Port Royal \$25,920 in anticipated

¹ According to Baker, although Curran resigned, Port Royal neither filled nor eliminated his position. (doc. 1, ¶ 7). As a result, Baker claims that the police department consisted of three positions when Port Royal abolished it. See *id.* ¶ 13.

revenue. *Id.*; Baker SMF, ¶ 5. Port Royal, however, continued to fund the police department through its General Fund, albeit without the revenue from Fermanagh Township. PR SMF, ¶ 6. Port Royal shifted the hours of police service that were previously allocated to Fermanagh to Port Royal. Baker SMF ¶ 7. Consequently, Port Royal's police coverage increased to 220 hours per month within the borough itself, with 100 hours still allocated to Mifflintown Borough. *Id.*

Port Royal took additional steps in response to the loss of revenue from the Fermanagh Township contract. On May 5, 2004, the Borough Council voted to reduce police coverage in Port Royal by 80 hours per month, effective June 1, 2004. PR SMF ¶ 7; Baker SMF ¶ 7. Port Royal accomplished this by reducing the hours of Mary Woods, the less-senior officer. PR SMF ¶ 8. Second, Baker and Woods contacted neighboring municipalities in an attempt to obtain a contract to provide police services and recoup some of the lost revenue. *Id.* ¶ 9; Baker SMF ¶ 9. Third, Port Royal Borough Council voted to increase the hourly rate for police services charged to Mifflintown Borough, from \$27 per hour to \$40 per hour. *Id.* ¶ 10.

On June 17, 2004, however, Mifflintown Borough informed Port Royal of its intention to terminate its police services contract, effective August 1, 2004. *Id.* ¶ 11. A few weeks later, at a July 7, 2004, Port Royal Borough Council

meeting, a Councilman "presented a motion to cut the Borough's police department to zero hours for Mifflintown Borough and Port Royal Borough, effective August 1, 2004." *Id.* ¶ 12. This motion passed and "had the effect of abolishing the Port Royal Police Department." Baker SMF ¶ 13.

3. Law Enforcement Services After Port Royal Abolished the Police Department

After Port Royal abolished its police department, it sold all of the police equipment. PR SMF ¶ 21. By default, the Pennsylvania State Police began to provide law enforcement services to Port Royal, *Id.* ¶ 22; however, the State Police do not enforce local ordinances, a job formerly handled by the Port Royal Police Department. Baker SMF ¶ 22.

Sometime after Port Royal abolished the police department, Barbara Bergstresser, the Mayor of Port Royal, and other members of the Borough Council contacted neighboring municipalities and their police officers concerning the purchase of police services for Port Royal. Baker SMF ¶ 23; doc. 31, p. 2. Their efforts, however, were unsuccessful. doc. 31, p. 3. Nonetheless, Port Royal allocated \$3,000 toward "police" in its 2006 budget. Baker SMF ¶ 26.

One of the individuals contacted by Port Royal officials was Officer Kent Smith, the Chief of Police of Mifflintown Borough. According to Smith, "about the time that Port Royal disbanded its Police Department, [he] was contacted

by Port Royal about providing police services for Port Royal." (doc. 27, ex. N). Smith claims that he met with Councilmen Bernie Peck, James Bryner, Brooks Gamble, and Mayor Barbara Bergstresser. *Id.* According to Smith, although he was actually sworn in as a police officer for Port Royal, "it did not work out" and his tenure was "very short." *Id.* However, sometime thereafter, the same Port Royal officials tried to purchase police services from Mifflintown Borough. *Id.*

The parties have provided additional facts in response to our Order requiring briefing on Smith's affidavit. See doc. 28. Port Royal contends that Smith was only offered a position as a Code Enforcement Officer² and although he was sworn in to that position, he never actually provided services to Port Royal. (doc. 31, p. 2-3). Furthermore, while Port Royal concedes that it approached Mifflintown's Borough Council about purchasing ten hours of police services per month, Port Royal never obtained the services. *Id.* at 3.

In response, Baker contends that Port Royal officials sought to purchase ten hours of police services per month from Mifflintown with the possibility of purchasing more the following year. (doc. 33, p. 4). Baker also notes that the

² Port Royal appears to use "Ordinance Enforcement Officer" and "Code Enforcement Officer" interchangeably when referring to the position of Smith and Langan. We will refer to the position as a Code Enforcement Officer for consistency.

August 13, 2005, Borough Council minutes state that the Borough Council voted to hire Smith as a "Police Officer." *Id.* at 5.

On September 9, 2006, the Borough Council hired John Langan to act as a Code Enforcement Officer on an as-needed basis. PR SMF ¶ 27. Port Royal hired Langan because the mayor, who ordinarily provided ordinance enforcement services, was unable to devote the necessary time to the task. *Id.* ¶¶ 24, 26. Since he began working for Port Royal Langan has not worked more than eight and one-half (8.5) hours in any month. PR SMF ¶ 29. Langan does not wear a uniform, possess a weapon, or drive a vehicle supplied by Port Royal. *Id.* ¶¶ 30, 31. Additionally, he has no arrest power or authority to enforce traffic laws or the Pennsylvania Crimes Code. *Id.* ¶ 30. Langan's duties "consist only of enforcing Borough of Port Royal ordinance provisions and issuing citations for violations of Borough ordinances." *Id.* ¶ 32.

C. Baker's Claim Against Port Royal

Baker filed this § 1983 action claiming that Port Royal abolished its police department "in bad faith to avoid the necessity of providing him with a due process hearing." (doc. 15, p. 4). Specifically, Baker contends that Port Royal deprived him of a property interest by abolishing the police department and claiming that the decision was based on financial concerns. (doc. 1, ¶¶ 17, 18, 27, 28). According to Baker, Port Royal's true motivation was to remove him from his position

without providing a hearing that would be required by statute. Baker alleges that Port Royal's actions violated his Fourteenth Amendment due process rights. *Id.* ¶¶ 18, 28.

In response, Port Royal argues that while Baker may have been protected from removal without "just cause," Port Royal's decision to abolish its entire police department does not trigger the property right established by the two applicable Pennsylvania employment statutes. (doc. 8, p. 11). Additionally, Port Royal claims that it had a legitimate, cost-saving basis for its decision and it did not subsequently recreate Baker's job or the police department. *Id.* at 15.

III. Discussion

A. Standard of Review

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, we may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In reviewing the evidence, we must construe facts and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d

538, 553 (1986). Summary judgment must be entered for the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Id.* at 586-87 (citations omitted).

The moving party bears the initial responsibility of stating the basis for its motion and identifying portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. It can discharge that burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

An issue is "genuine" "only if a reasonable jury, considering the evidence presented, could find for the nonmoving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3d Cir. 1988) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is "material" when it would affect the outcome of the trial under the governing law. *Anderson*, 477 U.S. at 248.

When a moving party has carried the burden under Rule 56, the burden shifts to the nonmoving party to demonstrate that an issue of material fact exists. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586-87 (citations omitted). The nonmoving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment," and cannot "simply reassert

factually unsupported allegations contained in [the] pleadings." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). "If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted). Factual averments in briefs do not satisfy the nonmoving party's burden. *Harter v. GAF Corp.*, 967 F.2d 846, 852 (3d Cir. 1992).

B. Baker's § 1983 Claim

42 U.S.C. § 1983 does not create substantive rights but rather serves as a method to vindicate federal rights conferred elsewhere. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). A plaintiff pursuing a § 1983 claim "must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citing *Samerica Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998)). The Fourteenth Amendment prohibits a state from depriving one's "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. An employee may hold a property interest in employment and, if so, must be afforded due process protections prior to discharge. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). We look to state law in considering

whether a party had a property interest in employment. *Elmore*, 399 F.3d at 282. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent sources such as state law'" *Loudermill*, 470 U.S. at 538 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

A state-law provision may create a property right when it requires "just cause" prior to the termination or demotion of an employee. See *id.* at 538-39. Baker contends that his property interest in employment comes from either the Pennsylvania Borough Code, 53 P.S. § 46171, *et seq.*, or the Police Tenure Act, 53 P.S. § 811, *et. seq.* The applicable statute depends on the number of officers employed by Port Royal at the time of its dissolution. The Pennsylvania Borough Code, applicable to a borough with a police force of three or more officers, see 53 P.S. § 46171, provides:

No person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for the following reasons:

(1) Physical or mental disability affecting his ability to continue in service, in which cases the person shall receive an honorable discharge from service.

(2) Neglect or violation of any official duty.

(3) Violation of any law which provided that such violation constitutes a misdemeanor or felony.

(4) Inefficiency, neglect, intemperance, immorality, disobedience of orders, or conduct unbecoming an officer.

(5) Intoxication while on duty.

(6) Engaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage.

53 P.S. § 46190. Section 46191 provides for a hearing upon suspension or removal:

If the person suspended, removed or reduced in rank shall demand a hearing by the commission, the demand shall be made to the commission. Such person may make written answers to any charges filed against him not later than the day fixed for hearing. The commission shall grant him a hearing which shall be held within a period of ten days from the filing of charges in writing, unless continued by the commission for cause at the request of the council or the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel.

Similarly, the Police Tenure Act, applicable to Pennsylvania boroughs with a police force of fewer than three members, 53 P.S. § 811, provides, in relevant part:

§ 812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act . . . shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law

which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

§ 814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days

While Baker contends that it is unclear whether the Police Tenure Act or the Borough Code applies to his claim, the parties do not dispute that Baker, as a Port Royal police officer, was protected by one of the statutory provisions. The parties also agree that the statutes are similar and the application of one statute or the other will not affect the outcome of the claim. See doc. 8, p. 11, n.2; doc. 15, p. 7.

Despite these statutory provisions, Pennsylvania allows a municipality to engage in a governmental reorganization which has the effect of terminating an employee's position. See *Appeal from Ordinance No. 384 of the Borough of Dale*, 382 A.2d 145, 147 (Pa. Commw. 1978) (explaining that "[t]here is no provision in the Police Tenure Act which prohibits or limits or

in any way applies to the abolition of a police department"). While the Third Circuit does not appear to have considered the issue, other courts refer to this as the "reorganization exception." See, e.g., *Misek v. City of Chicago*, 783 F.2d 98, 100 (7th Cir. 1986); *McNeil v. City of Pittsburgh*, Civ. No. 94-1276, 1997 U.S. Dist. LEXIS 2034, at *15 (W.D. Pa. Feb. 6, 1997). "Where this exception applies, it circumscribes the employee's substantive property right." *Campana v. City of Greenfield*, 164 F. Supp.2d 1078, 1092 (E.D. Wis. 2001).

Although many courts recognize a municipality's right to reorganize or abolish a department, an employee may challenge the reorganization. See, e.g., *Misek*, 783 F.2d at 100-101. Allowing such a challenge prevents government officials from merely citing "reorganization" to circumvent the statutory protections enjoyed by certain employees. *Id.* In Pennsylvania, a former employee can challenge a reorganization or abolition of a position or office by showing that the municipality's actions were "a mere pretense or subterfuge." *Twp. of Perkiomen v. Mest*, 522 A.2d 516, 520 (Pa. 1987).

The employee's challenge, however, is not without limit. "State law may impose limitations on the extent to which an employee can challenge an alleged reorganization." *Campana*, 164 F. Supp.2d at 1093 (citing *Misek*, 783 F.2d at 101). The Pennsylvania Supreme Court has held that a showing that the reorganization was a pretense or subterfuge is restricted to

demonstrating that (1) the position or department was eliminated to circumvent a court order requiring reinstatement of an employee, or (2) the eliminated position or department was subsequently recreated. *Mest*, 522 A.2d at 520. Baker's § 1983 claim is based on the second limitation.

The Pennsylvania Supreme Court discussed this limitation in *Carey v. City of Altoona*, 16 A.2d 1 (Pa. 1940). In *Carey*, a police chief was demoted through a municipal enactment that reorganized the police department, effectively eliminating the police chief's position. *Id.* at 2. The Pennsylvania Supreme Court, in examining the municipality's decision, explained: "[W]hatever be the language of the enactment purporting to effect the abolition, if the office is substantially recreated, though under a different name, with a new appointee performing the same duties as the prior incumbent, the court will invalidate such legislation as being nothing more than a pretense." *Id.* But the court rejected the former chief's claim, concluding:

[W]here, as here, the position and its emoluments are wholly and unquestionably abolished, and no new rank in the police force, either in name or substance, is created similar to that which is being discontinued, it is not for a court to say that the motive underlying the enactment of the ordinance may have been personal or political rather than a disinterested desire to further the public welfare. *Id.*

Similarly, in *Mest*, the court considered a claim by former police officers that the municipality disbanded the

police department in bad faith. Despite evidence showing that the economic reasons cited by the municipality were a pretext for removing the police chief, the court reaffirmed its holding from *Carey* and explained:

The rule that emerges from these cases is that the courts should only look for bad faith or improper motives in the discontinuance of the job of police chief by a municipality where the abolition was a mere pretense or subterfuge. The pretense or subterfuge must have been designed to evade a court order, or be evidenced by the recreation of substantially the same job under a different name or title. *Id.* at 520.

Pursuant to this standard, the court reversed the trial court's grant of mandamus, finding that the entire police department was disbanded and that "[n]one of the jobs was substantially recreated in any way." *Id.* The court emphasized the peril inherent in judicial scrutiny of the motives of municipal officials:

The actions of the supervisors are fully reviewable by the voters. Our courts must use appropriate self-restraint when asked to review or second-guess decisions of elected municipal officials. Potential review of every legislative decision made in order to find improper personal or political motives would lead to government by the judiciary. This is not wise, and it is not the system provided by our Constitution. *Id.*

With this framework in mind, we can examine Baker's claim that Port Royal abolished its police department in bad faith to avoid providing Baker a pre-termination hearing. Baker contends that Port Royal's decision to increase the hourly rate

charged to Mifflintown for police services was not based on economic need but rather in the hope that Mifflintown would cancel the contract. (doc. 15, p. 15). The end result, according to Baker, was that Mifflintown's cancellation provided the excuse for Port Royal to abolish its police department without giving Baker a due-process hearing. *Id.* at 16-17. Baker claims that Port Royal sought to remove him without a due-process hearing due to his child's medical condition. (doc. 27, p. 6). Specifically, Baker claims that Port Royal was concerned that the time he spent caring for his child left the borough with inadequate police protection. *Id.* at 7. Additionally, according to Baker, Port Royal believed that the cost of treating his child's medical condition would increase the borough's insurance rates. *Id.*

In addition to questioning the motive underlying Port Royal's decision to abolish the police department, Baker also contends that Port Royal later recreated its police department. In support of this claim, Baker submitted the affidavit of Kent Smith, Mifflintown Borough's Chief of Police. (doc. 27, ex. N). Sometime after the police department's abolition, three Port Royal Councilmen and its Mayor, Barbara Bergstresser, approached Smith about providing "police services" for Port Royal. *Id.* Smith claims that Bergstresser "actually swore [him] in as a police officer for Port Royal"; however, his "tenure as a police officer for Port Royal was very short"

because "[i]t did not work out." *Id.* Smith does not disclose his powers or duties nor does he reveal how long he remained in the position or why he left. Baker's other support for his claim is found in the minutes of the August 13, 2005, Port Royal Borough Council meeting. See doc. 32, ex. T. There, the minutes describe a vote "to hire Kent Smith as a Police Officer from Mifflin Borough." *Id.*

Baker's other evidence concerns unsuccessful attempts by Port Royal officials to purchase police services from Smith and Mifflintown Borough as well as Port Royal's budgeting for the cost of police services. See doc. 27, pp. 8-9; doc. 33, p. 4. This evidence, while suggestive of Port Royal's intent to recreate its police force, does not show that it actually did so. Thus, it is not part of our analysis regarding whether Port Royal "substantially recreated" the force with new officers performing "the same duties." See *Mest*, 522 A.2d at 520.

In arguing that it did not substantially recreate its police department, Port Royal disputes Smith's characterization of his interaction with Port Royal officials. Minutes from a July 9, 2005, Borough Council meeting show that Port Royal officials intended to meet with Smith to discuss a position as a code enforcement officer, not as a police officer. (doc. 32, exs. O, P, S). Unsworn declarations from the Borough Council members who met with Smith, and those who voted at an August 13, 2005, meeting, also show that he was offered a code enforcement

position, not that of a police officer. *Id.* exs. O, P, Q, R, V. Port Royal also refutes Baker's reliance on the language of the August 13, 2005, meeting minutes indicating that the Borough Council was to hire Smith as a police officer, explaining that the statement appears in a paragraph titled "Code Enforcement Officer." (doc. 31, p. 6).

While there is a dispute regarding Officer Smith's title and his duties during his short time with Port Royal, other evidence shows that Port Royal did not recreate its police department. First, while Baker recounts various efforts by Port Royal officials, Port Royal did not purchase police services from Mifflintown Borough. (doc. 31, p. 3). Second, Port Royal eventually hired John Langan as a Code Enforcement Officer on an as-needed basis. PR SMF ¶ 27. Langan has not worked more than eight and one-half (8.5) hours in any month since his hiring. *Id.* ¶ 28, 29. As a Code Enforcement Officer, Langan's powers and duties are limited; he may only enforce Port Royal ordinance provisions and issue citations for their violation. *Id.* ¶ 32. He has no weapon, uniform, or arrest powers, and he must provide his own vehicle. *Id.* ¶ 30. The only function that Langan performs which was formerly performed by Port Royal officers is the enforcement of a certain set of ordinance provisions. *Id.* ¶ 23.³ Third, the Pennsylvania State Police has continuously

³ This paragraph in Port Royal's Statement of Material Facts may be misnumbered as it follows paragraph 32.

supplied police services since the dissolution of the police department. PR SMF ¶ 22.

Based on our review of the record, a reasonable jury could not conclude that after abolishing its police department, Port Royal substantially recreated the police department with new officers performing the same duties. Construing the facts in the light most favorable to Baker, Port Royal's decision to hire Smith for a short time to provide police services, to later hire Langan for code enforcement, and to utilize the services of the Pennsylvania State Police does not show that it "substantially recreated" Baker's position or the department as a whole. Smith provided no detail regarding his duties as a police officer in Port Royal and his tenure "was very short." (doc. 27, ex. N). Langan, as a part-time code enforcement officer, does not have the same or similar authority or duties as that of a full-time officer. Finally, the use of the Pennsylvania State Police for police services is not a recreation of the Port Royal police force, as the state police is statutorily bound to cooperate with counties and municipalities in preserving law and order. See *Youngwood Borough Police Dep't v. Comm'r, Pa. Labor Relations Bd.*, 539 A.2d 26, 29 (Pa. Commw. 1988).

Lacking a genuine issue as to whether Port Royal substantially recreated its police force, Baker, pursuant to Pennsylvania law, cannot show that Port Royal's abolition of the

police force was a "mere pretense or subterfuge." Without this showing, we may not inquire into the motive underlying Port Royal's decision to abolish the police force. *Mest*, 522 A.2d at 520. See also *Campana*, 164 F. Supp.2d at 1093-94; *Limes-Miller v. City of Chicago*, 773 F. Supp. 1130, 1139 (N.D. Ill. 1991). As a result, we may not consider Baker's allegations that Port Royal raised the rate for police services to force Mifflintown to cancel the contract and provide Port Royal the excuse to abolish its police department. (doc. 33, p. 5). Similarly, Baker's allegation that high insurance costs due to his son's serious medical condition brought about a pretextual abolition of the police department may not be considered as it also relates to Port Royal's motive. As the Pennsylvania Supreme Court explained in *Carey*, "unless the abolished office or department is substantially recreated, a court may not pry into the motives of a local legislative body." *Mest*, 522 A.2d at 519 (discussing *Carey*).

Because we conclude that there is no genuine issue as to whether Port Royal substantially recreated its police department, Baker is not protected by the Police Tenure Act or the Borough Code, whichever may apply. Without an infringement

of a protected property right, Baker's § 1983 claim fails. Therefore, we will grant Port Royal's motion for summary judgment.

/s/William W. Caldwell
William W. Caldwell
United States District Judge

Date: May 30, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREW BAKER,	:	
Plaintiff	:	
	:	
vs.	:	CIVIL NO. 1:CV-06-0932
	:	
BOROUGH OF PORT ROYAL,	:	
PENNSYLVANIA,	:	
Defendant	:	

ORDER AND JUDGMENT

AND NOW, this 30th day of May, 2007, upon consideration of Defendant's (converted) Motion for Summary Judgment, the parties' briefs, the record, and based on the accompanying Memorandum, it is Ordered that:

1. Defendant's Motion for Summary Judgment (doc. 7) is granted and judgment is entered in favor of the Defendant and against the Plaintiff.
2. The Clerk of Court shall close this file.

/s/William W. Caldwell
William W. Caldwell
United States District Judge